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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1974

No.

CARL M. AUSTIN, et al., Appellants

v.

STATE OF NEW HAMPSHIRE, et al., Appellees

On Appeal from the Supreme
Court of the State of New Hampshire

JURISDICTIONAL STATEMENT

Appellants appeal from the final order and judgment of the Supreme Court of the State of New Hampshire, entered on February 28, 1974 declaring the New Hampshire Commuters Income Tax, N.H. RSA Ch. 77-B, not violative of the privileges and immunities and equal protection clauses of the United States Constitution. This statement is sub-

mitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented. A copy of the Notice of Appeal from the Supreme Court of New Hampshire is attached hereto (Appendix A, infra, pp. A1-A3).

OPINION BELOW

The opinion of the Supreme Court of the State of New Hampshire is reported in 316 A.2d 165 as Carl M. Austin et al. v. State Tax Commission, Merrimack No. 6641. A copy of the opinion is attached hereto (Appendix B, infra, pp. A4-A9).

JURISDICTION

(i) This suit was instituted as a petition by three residents of the State of Maine before the Superior Court of the State of New Hampshire for Merrimack County against the State of New Hampshire, the Commissioners of the New Hampshire Tax Commission and the Director of the Business Profits Division of the New Hampshire Tax Commission individually and in their respective capacities, seeking a declaratory judgment that N.H. RSA Ch. 77-B, the New Hampshire Commuters Income Tax, was (inter alia) in violation of the rights of the petitioners under the Constitution of the United States of America.

The defendants moved to dismiss, which motion was denied and defendants seasonably excepted. All questions of

law raised by the petition and the action of the Superior Court on the motion to dismiss were reserved and transferred to the Supreme Court of the State of New Hampshire without ruling. A copy of the order of the New Hampshire Superior Court reserving and transferring the case is attached hereto (Appendix C, infra, pp. A10-A11).

(ii) The final determination of the Supreme Court of the State of New Hampshire, the Court below, was entered on February 28, 1974. The Notice of Appeal (Appendix A, infra, pp. A1-A3) dated May 9, 1974, was filed in the Court below on May 13, 1974.

(iii) The jurisdiction of this Court to review the judgment below on direct appeal is conferred by 28 U.S.C.A. §1257(2).

(iv) The state statute, which as construed by the Supreme Court of the State of New Hampshire is not violative of appellants' rights under the privileges and immunities clause or the equal protection clause of the United States Constitution, is the State of New Hampshire Revised Statutes Annotated Ch. 77-B (as enacted by Chapter 20, N.H. Laws of 1970 and amended by Chapter 57, N.H. Laws of 1970) (Appendix D, infra, pp. A12-A). The State of Maine imposes a tax on the income of residents regardless of source, and the income of nonresidents derived from sources within

Maine (36 M.R.S.A. §5111). A credit is provided by Maine for its residents against the Maine tax for taxes paid to foreign jurisdictions on income also taxable in Maine (36 M.R.S.A. §5127). These statutory provisions are also attached hereto (Appendix E, infra, p. A22).

(v) The authorities relied on to substain the substantiality of the questions presented are --

a. In respect to the violation of the Privileges and Immunities Clause of Article IV §2 of the United States Constitution. Mullaney v. Anderson 342 U.S. 415 (1952); Toomer v. Witsell 334 U.S. 385, 395 (1948); Travis v. Yale & Towne Mfg. Co. 252 U.S. 60, 80-81 (1920); Shaffer v. Carter 252 U.S. 43, 52-53 (1920); Ward v. Maryland 79 U.S. 418, 430 (1870).

b. In respect to the violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Colgate v. Harvey 296 U.S. 404 (1935).

QUESTIONS PRESENTED

1. Whether a New Hampshire statute which taxes income of nonresidents earned in New Hampshire but which does not tax income of residents earned in New Hampshire violates the Privileges and Immunities Clause of Article IV §2 of the United States Constitution?

2. Whether a New Hampshire statute which taxes income of nonresidents earned in New Hampshire but which does not tax income of residents earned in New Hampshire violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

STATEMENT

Appellants are residents of the State of Maine who during the taxable year 1970 earned income in the State of New Hampshire. A tax was imposed by the State of New Hampshire on the appellants' income earned in New Hampshire under the authority of the N.H. RSA Ch. 77-B 2 II (Appendix D, infra, p. A14). The tax imposed in 1970 was withheld from appellants' wages by their employers pursuant to the N.H. RSA Ch. 77-B:10 (Appendix D, infra, pp. A16-A17).

Appellants paid the tax imposed by the State of New Hampshire and received a credit from the State of Maine for the New Hampshire tax paid. The State of Maine imposed a tax on the entire taxable income of residents and the income of nonresidents derived from sources within Maine (36 M.R.S.A. §5111) (Appendix E, infra, p. A22). The State of Maine gives a credit to residents for taxes paid other jurisdictions (36 M.R.S.A. §5127) (Appendix E, infra, pp. A22-A23).

Appellants brought a petition for

declaratory judgment on behalf of themselves and other taxpayers similarly situated before the New Hampshire Superior Court for Merrimack County, challenging the constitutionality of the New Hampshire Commuters Income Tax under the Constitution of the United States and the Constitution of the State of New Hampshire. The appellees brought a motion to dismiss, which was denied. Exceptions were noted by the Superior Court and all issues were transferred to the New Hampshire Supreme Court (Appendix C, infra, pp. A10-A11).

The New Hampshire Supreme Court held the appellants had standing to challenge the tax imposed. Austin v. State Tax Commission 316 A.2d 165, 166. The Court went on to hold the tax imposed was not in violation of the privileges and immunities and equal protective clauses of the Federal or the State constitution. Id. at 167, 168.

THE QUESTIONS ARE SUBSTANTIAL

The Supreme Court of the State of New Hampshire, the Court of last resort of the State of New Hampshire, in the decision below decided in favor of the validity of the constitutionality of N.H. RSA Ch. 77-B, the New Hampshire Commuters Income Tax. The Court in its decision considered the arguments of appellants against the validity of the tax, which were grounded in the privi-

leges and immunities and equal protection clauses of the Constitution of the United States and of New Hampshire. Austin v. State Tax Commission 316 A.2d 165, 166.

This Honorable Court has jurisdiction to hear this appeal provided it is satisfied that the questions presented are substantial. In Charlestown Assn. v. Alderson 324 U.S. 182, 185-186 the Supreme Court stated:

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court."

Tax liability under the New Hampshire Commuters Income Tax, N.H. RSA Ch. 77-B, depends on whether or not one is a resident of the State of New Hampshire. If one is a resident of New Hampshire he will never pay a tax under the provisions of the New Hampshire Commuters Income Tax. The statute contains no provision for a tax on income earned in New Hampshire by New Hampshire residents.

The statute does purport to levy a tax on income of residents derived from

outside of New Hampshire.

> "A tax is hereby imposed upon every resident of the state, which shall be levied, collected and paid annually at the rate of four percent of their income which is derived outside the state of New Hampshire as defined in RSA 77-B:1 'New Hampshire taxable income;' provided, however, that if such income shall be subject to a tax in the state in which it is derived, such tax shall constitute full satisfaction of the tax hereby imposed; and provided further, that if such income is exempt from taxation because of statutory or constitutional provisions in the state in which it is derived, or because the state in which it is derived does not impose an income tax on such income, it shall be exempt from taxation under this paragraph." RSA 77-B:2 I

Effectively no tax will ever be paid on income derived outside of New Hampshire. A full credit is given for whatever tax is levied by another state on income earned outside New Hampshire by New Hampshire residents and if no tax is levied by another state, no tax is levied by New Hampshire on its residents under the provisions of the New Hampshire Commuters Income Tax. Even if one were to assume that New Hampshire residents are being taxed under the provisions of N.H. RSA 77-B2 I, the amount of tax would vary depending on the tax structure of the jurisdiction in which the New Hampshire resident was deriving income.

Thus, even as between New Hampshire residents there is discrimination if one accepts the premise that a tax is effectively levied on New Hampshire residents.

In contrast to the New Hampshire resident working in New Hampshire who never pays a tax, a Maine resident or a resident of Massachusetts or Vermont or any other nonresident of New Hampshire working alongside the New Hampshire resident, with the same earnings, marital status and number of dependents would pay the tax imposed by N.H. RSA 77-B II. Even as among the residents of Maine, Massachusetts and Vermont and other nonresidents of New Hampshire with the same earnings, marital status and number of dependents, the tax imposed by N.H. RSA 77-B II can differ in amount and is discriminatory.

An imposition of such an income tax upon nonresidents and not upon residents is in direct violation of the privileges and immunities clause of the Constitution of the United States.

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." United States Constitution Article IV Sec. 2.

The purpose of the privileges and immunities clause is well stated in Toomer v. Witsell 334 U.S. 385 (1948) by Chief Justice Vinson:

"The primary purpose ... was to fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." Id at 395

In Toomer v. Witsell, supra the State of South Carolina attempted to impose higher license taxes on nonresidents who caught shrimp off the coast of South Carolina than that imposed upon South Carolina shrimp fishermen. The Court held that the South Carolina statute violated Article IV §2 of the United States Constitution (the privileges and immunities clause). In addition, the South Carolina statute was also held to be in violation of commerce clause Art. 1 §8 of the United States Constitution. The Toomer case differs from the instant case in that the South Carolina statute held to be unconstitutional did impose a license tax upon its own residents albeit one hundred times less than the license tax upon the nonresidents. See also Mullaney v. Anderson 342 U.S. 415, N.H. RSA Ch. 77-B, the New Hampshire Commuters Income Tax, imposes no tax on New Hampshire residents deriving income in New Hampshire while imposing a tax of four percent of New Hampshire derived income with certain limitations upon nonresidents.

In a case involving the general income tax law of the State of New York,

the United States Supreme Court invalidated those portions of the law which permitted residents greater personal exemptions than those granted nonresidents. Travis v. Yale & Towne Mfg. Co. 252 U.S. 60 (1920). Justice Pitney speaking for the court said

> "In the concrete, the particular incidence of the discrimination is upon citizens of Connecticut and New Jersey, neither of which States has an income tax law. A considerable number of complainant's employees, residents and citizens of one or the other of those States, spend their working time at its office in the city of New York, and earn their salaries there. The case is typical; it being a matter of common knowledge that from necessity due to the geographical situation of that city, in close proximity to the neighboring States, many thousands of men and women, residents and citizens of those States, go daily from their homes to the city and earn their livelihood there. They pursue their several occupations side by side with residents of the State of New York -- in effect competing with them as to wages, salaries, and other terms of employment. Whether they must pay a tax upon the first $1,000 or $2,000 of income, while their associates and competitors who reside in New York do not, makes

> a substantial difference. Under the circumstances as disclosed, we are unable to find adequate ground for the discrimination, and are constrained to hold that it is an unwarranted denial to the citizens of Connecticut and New Jersey of the privileges and immunities enjoyed by citizens of New York. This is not a case of occasional or accidental inequality due to circumstances personal to the taxpayer (see Amoskeag Savings Bank v. Purdy, 231 U.S. 373, 393-394; Maxwell v. Bugbee, 250 U.S. 525, 543); but a general rule, operating to the disadvantage of all nonresidents including those who are citizens of the neighboring States, and favoring all residents including those who are citizens of the taxing State." Id. at 80, 81

The instant case is different from the Travis case supra in that in the case before this court no income tax is levied upon New Hampshire residents working in New Hampshire while in the Travis case an income tax was levied upon residents of the State of New York. However, the rationale of the Travis case as to violation of privileges and immunities of nonresidents applies to the instant case. For both cases a discrimination against nonresidents exists. In the instant case appellants contend the discrimination is even more severe in that no tax is levied upon New Hampshire residents working in New Hampshire.

In addition to the substantial question whether the New Hampshire Commuters Income Tax violates the privileges and immunities granted by the United States Constitution to the citizens of each state, there is also the substantial question whether the New Hampshire Commuters Income Tax violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

States may resort to classification for the purpose of taxation. Royster Guano Co. v. Virginia 253 U.S. 412, 415 and this power to classify is of wide range and flexibility. Louisville Gas Co. v. Coleman 277 U.S. 32, 37. However a tax which results in arbitrary discrimination is a denial of the equal protection of the law. As was stated by the Supreme Court in Colgate v. Harvey 296 U.S. 404, 423

> "The classification, in order to avoid the constitutional prohibition, must be founded upon pertinent and real differences, as distinguished from irrelevant and artificial ones. The test to be applied in such cases as the present one is -- does the statute arbitrarily and without genuine reason impose a burden upon one group of taxpayers from which it exempts another group, both of them occupying substantially the same relation toward the subject matter of the legislation?"

Appellants contend a substantial question is raised when an income tax statute taxing income of nonresidents derived in a taxing jurisdiction does not tax the income of residents in that jurisdiction. Appellants submit this is an arbitrary classification imposing a burden upon one group of taxpayers (nonresidents) without imposing a similar burden on another group of taxpayers (residents).

Although appellants are not immediately paying out more tax dollars they are directly injured. It is true appellants receive a credit from the State of Maine for Commuters Income Tax paid the State of New Hampshire but appellants strenuously disagree with the following statement of the New Hampshire Supreme Court in Austin v. State Tax Commission 316 A.2d 165, 167 (see Appendix B, infra, p. A7).

> "Since these plaintiffs pay no greater tax by reason of the New Hampshire tax than they would otherwise pay to Maine, they are not prejudiced by the Commuters Income Tax."

The services provided by the State of New Hampshire to nonresidents and residents for which nonresidents are paying tax dollars under N.H. RSA Ch. 77-B, are not being paid for on a proportional basis by residents under N.H. RSA Ch. 77-B. In fact no tax dollars are being paid under N.H. RSA Ch. 77-B

by New Hampshire residents to provide these services. If New Hampshire residents were taxed on New Hampshire derived income under N.H. RSA Ch. 77-B at the same rate as Maine residents, there would be more tax dollars to provide additional services in New Hampshire to residents and nonresidents. On the other hand if services paid for by taxes under N.H. RSA Ch. 77-B were to remain at the same level and the residents shared the tax burden with appellants under N.H. RSA Ch. 77-B, the appellants would be paying a lower tax. Appellants are injured as residents of New Hampshire are not sharing the tax burden under N.H. RSA Ch. 77-B.

The appellants do not object to paying tax dollars to the State of New Hampshire provided New Hampshire residents pay tax dollars on the same basis. However, when tax dollars are not paid on the same basis by residents and nonresidents, as in the instant case, the plaintiffs are suffering a very real injury, as tax dollars being collected under a law which, if appellants are correct, violates the privileges and immunities clause of the United States Constitution as well as the equal protection clause, are being diverted from appellants' domiciliary state.

CONCLUSION

On income earned in New Hampshire, Maine residents are subject to the New Hampshire Commuters Income Tax, N.H. RSA Ch. 77-B. On income earned in New Hampshire, residents of New Hampshire are not subject to the New Hampshire

Commuters Income Tax. Appellants contend such a discrimination on the basis of residency is a violation of the privileges and immunities of the citizens of the State of Maine paying taxes pursuant to N.H. RSA Ch. 77-B. The taxing provisions of N.H. RSA Ch. 77-B when applied to the appellants result in an abridgement of their Federal constitutional right to have the same privileges and immunities under the laws of the State of New Hampshire as residents of New Hampshire and their right to equal protection under the laws of the State of New Hampshire. Appellants claim these rights have been adversely affected by the operation of N.H. RSA Ch. 77-B and a justiciable controversy exists as to their claim. This Court should therefore note probable jurisdiction of the present appeal.

Respectfully submitted.

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199 Main Street
Saco, Maine 04072
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Of Counsel

July 1974

APPENDIX A

In the Supreme Court of
State of New Hampshire

Carl M. Austin,
Arthur W. Peverly and
Richard W. Logan,
Appellants

v.

The State of New Hampshire,
Lawton Chandler, William
Conway and William Maynard,
Tax Commissioners and
Lawrence Blake, Director
of the Business Profits
Division of the New
Hampshire Tax Commission,
Appellees

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Carl M. Austin, Arthur W. Peverly and Richard W. Logan, the appellants above-named, hereby appeal to the Supreme Court of the United States from the final order and judgment of the Supreme Court of the State of New Hampshire, declaring the New Hampshire Commuters Income Tax, RSA Ch. 77-B, not violative of the privileges and immunities and equal protection clauses of the United States Constitution, entered herein on February 28, 1974.

This appeal is taken pursuant to

28 U.S.C. §1257(2).

/s/Charles W. Smith
Smith, Elliott, Wood & Nelson
Counsel for Appellants
by Charles W. Smith
Saco, Maine

AFFIDAVIT OF SERVICE

I, Charles W. Smith, an attorney in the office of Messrs. Smith, Elliott, Wood & Nelson, P.A., attorneys of record for Carl M. Austin, Arthur W. Peverly and Richard W. Logan, appellants herein, depose and say that on the ninth day of May, 1974, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the State of New Hampshire, Lawton Chandler, William Conway and William Maynard, Tax Commissioners and Lawrence Blake, Director of the Business Profits Division of the New Hampshire Tax Commission, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to Warren B. Rudman, Attorney General of the State of New Hampshire, Office of the Attorney General, State House Annex, Concord, New Hampshire, counsel of record for the appellees.

/s/Charles W. Smith
Charles W. Smith

State of Maine
York, ss.

Subscribed and sworn to before me, at Saco this ninth day of May, 1974.

/s/Tamara G. Rumery
Notary Public

My commission expires:

March 13, 1981

APPENDIX B

Carl M. AUSTIN et al.

v.

STATE TAX COMMISSION.

No. 6641.

Supreme Court of New Hampshire,

Merrimack.

Feb. 28, 1974.

GRIMES, Justice

Three residents of Maine who earned income while working in New Hampshire challenge the constitutionality of the New Hampshire Commuters Income Tax. RSA ch. 77-B. During taxable year 1970 plaintiffs, as nonresidents of New Hampshire earning income in New Hampshire, had withheld from their wages by their employers a tax based on the amount of income they earned in New Hampshire. RSA 77-B:10. Plaintiffs paid the tax and brought a petition for declaratory judgment on behalf of themselves and other residents of Maine similarly situated, challenging the tax as violative of the Constitutions of the United States and New Hampshire. Defendant's motion to dismiss was denied, exceptions noted and all issues raised were transferred to this court without ruling by Flynn, J.

An understanding of the operation of the Maine Income Tax is necessary to consider defendant's argument that plaintiffs

lack standing to bring this action. Maine levies a tax on the income of residents regardless of its source and on the income of nonresidents which is derived from sources within that State. 36 Me. Rev. Stat. Ann. §5111 (Supp. 1973). Maine provides a credit for its residents against the Maine tax for any taxes paid to foreign jurisdictions on income also taxable in Maine. 36 Me. Rev. Stat. Ann. § 5127 (Supp. 1973); see Opinion of the Justices, 110 N.H. 26, 259 A.2d 660 (1969). In complement to the Maine statute, the New Hampshire Commuters Income Tax is limited so as not to exceed any income tax which would be payable to the commuter's home state if the income were earned and taxed in that State. RSA 77-B:2 II.

[1] The effect of the Maine credit and the New Hampshire limitation is that New Hampshire collects a tax from Maine residents working in New Hampshire which otherwise would be paid in the same amount to the State of Maine. Defendant contends that, because the Commuters Income Tax imposes no tax burden beyond that otherwise owed the State of Maine, the plaintiffs lack standing. Considering the policy of providing accessibility to the courts for the settlement of grievances and for challenging the use of power by government, we hold that the claims of these plaintiffs are entitled to consideration.

[2] Defendant also contends that declaratory relief is not available to the plaintiffs as they should have proceeded by way of a petition for abatement under RSA 77-B:22. "A petition for declaratory judgment is particularly appro-

priate to determine the constitutionality of a statute when the parties desire and the public need requires a speedy determination of important public interests involved therein". Chronicle, etc., & Gazette Pub. Co. v. Attorney-General, 94 N.H. 148, 150, 48 A.2d 478, 479-480 (1946); Levitt v. Maynard, 104 N.H. 243, 182 A.2d 897 (1962); Carbonneau v. Company, 96 N.H. 240, 73 A.2d 802 (1950).

Petitioners' argument against the tax is grounded in the privileges and immunities and equal protection clauses of the Constitutions of the United States and of New Hampshire. The purpose and scope of these clauses have been described as placing citizens of each State on the same footing as those of other States in a variety of ways including acquisition and enjoyment of property, free ingress to and egress from other states, and engaging in lawful commerce, trade or business without molestation. Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 78, 40 S.Ct. 228, 231, 64 L.Ed. 460, 469, (1920); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 19 L.Ed. 357 (1868); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 20 L. Ed, 449 (1870).

In a companion case to Travis, the Supreme Court in deciding whether or not a State has jurisdiction to impose an income tax on nonresidents, said "where the question is whether a state taxing law contravenes rights secured by that instrument [the Constitution], the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed." Shaffer

v. Carter, 252 U.S. 37, 55, 40 S.Ct. 221, 226, 64 L.Ed. 445, 458 (1920). Later in the same opinion, the court rejected an argument against the constitutionality of the tax commenting that the reasoning "errs in paying too much regard to theoretical distinctions, and too little to the practical effect and operation of the respective taxes as levied . . . ." Id. at 56, 40 S.Ct. at 227, 64 L.Ed. at 458. Accordingly, this court will weigh the commuters income tax in terms of its "practical operation and effect". Opinion of the Justices, 85 N.H. 572, 154 A. 633 (1931); Opinion of the Justices, 126 Me. 614, 137 A. 50 (1927).

[3,4] Since these plaintiffs pay no greater tax by reason of the New Hampshire tax than they otherwise would pay to Maine, they are not prejudiced by the commuters income tax. They are placed at no competitive disadvantages in New Hampshire which they would not be under without the tax, and they certainly are not deterred by the tax from entering the New Hampshire labor market. The tax thus does no violence to the privileges and immunities clause. The only burden on these plaintiffs is imposed by the withholding arrangement of New Hampshire as opposed to the quarterly payments of Maine, and the requirement of filing a New Hampshire return. The Supreme Court of the United States dealt with the argument that withholding the income of nonresidents at its source was an unconstitutional discrimination by saying that such a contention was "unsubstantial" and that the withholding "does not in any wise increase the burden of the tax

upon non-residents, but merely recognizes the fact that as to them the State imposes no personal liability and hence adopts a convenient substitute for it." Travis v. Yale Mfg. Co., 252 U.S. 60, 76, 40 S.Ct. 228, 230, 64 L.Ed. 460, 468. Likewise, the withholding and filing arrangements are necessary incidentals to administering the tax and do not create the "substantial difference" in treatment which would sustain plaintiffs' burden in proving the tax discriminatory to the point of being arbitrary and unreasonable. Wheeler v. State, 127 Vt. 361, 249 A.2d 887 (1969).

[5] Plaintiffs contend that the legislature has power only to levy taxes on "inhabitants of, and residents within, the said state" (N.H. Const. Pt. 2, Art. 5) and that it has therefore no power to levy an income tax on nonresidents. That article, however, together with Article 6, provides for the taxing of all estates and other classes of property. The tax imposed by RSA Ch. 77-B is a tax upon the receipt of property in the form of income in New Hampshire and is therefore within the power of the State. Opinion of the Justices, 99 N.H. 512, 112 A.2d 44 (1955); Opinion of the Justices, 111 N.H. 210, 212, 279 A.2d 741, 742 (1971).

A resident pays an unearned income tax, a $10 residence tax, and other taxes while the nonresident pays nothing for the state services which protect him and his employment unless by means of this tax which operates to produce a "practical equality" by means of the power

"to equitably defray the expense of protecting the right of property and other rights". Opinion of the Justices, 97 N.H. 546, 81 A.2d 853, 855 (1951). Because the tax is not discriminatory in its practical operation on these plaintiffs, the court holds it not violative of the privileges and immunity clause or the equal protective clause of the Federal Constitution or of the State constitution.

Declaratory judgment for the defendant.

All concurred.

APPENDIX C

THE STATE OF NEW HAMPSHIRE

Merrimack, SS.

Superior Court

Carl M. Austin,
Arthur W. Peverly and
Richard W. Logan

v.

The State of New Hampshire;
Lawton Chandler, William Conway,
and William Maynard, Tax Commissioners;
and Lawrence Blake, Director of the
Business Profits Division of the
New Hampshire Tax Commission

RESERVED CASE

This is a petition for declaratory judgment wherein the petitioners allege that the commuters income tax, RSA 77-B, to be in violation of the rights of the petitioners under the Constitution of the United States of America and the Constitution of the State of New Hampshire; and seek injunctive and other relief.

The defendant moved to dismiss, which motion was denied and defendant has seasonably excepted. It is agreed that the plaintiffs are residents in the State of Maine, employed in the State

of New Hampshire, and have paid the tax assessed by RSA 77-B in accordance with their tax returns copies of which are exhibits and are transferred with the record in accordance with the list of exhibits included herein.

All question of law raised by the within petition and the action of the Court on the motion to dismiss are reserved and transferred without ruling.

The pleadings, including all motions with the Court's action thereon and with a list of the exhibits transferred, are to be printed as an appendix.

Reserved and transferred.

September 20, 1972 — Charles J. Flynn
Charles J. Flynn

1970
STATE OF NEW HAMPSHIRE

• • • •

REVISED STATUTES ANNOTATED

• • • •

RSA

Chapter 77-B

Commuters Income Tax

(As enacted by Chapter 20, Laws of 1970, and amended by Chapter 57, Laws of 1970)

• • • •

RSA
Chapter 77-B

(as inserted by 1970, 20:1 and amended by 1970, 57)

Commuters Income Tax

77-B:1 Definitions. As used in this chapter the following terms shall have the following meanings unless the context clearly requires otherwise:

I. "Adjusted gross income" shall mean, for any taxable year, the adjusted gross income as defined in the United States internal revenue code in effect for that taxable year but excluding income which under the code is exempted from taxation by the state.

II. "Commission" shall mean the state tax commission.

III. "Estimated tax" shall mean the amount which the individual estimates as the amount of the income tax imposed by this chapter for the taxable year, minus the amount which the individual estimates as the sum of any credits against such tax.

IV. "Taxpayer" shall mean any person subject to the provisions of this chapter.

V. "Individual" shall mean a natural person.

VI. "New Hampshire taxable income" shall mean, for any taxable year, taxable income as defined under the United States internal revenue code in effect for that taxable year less any New Hampshire derived income, less an exemption of two thousand dollars and less any taxable business profits taxed pursuant to the business profits tax.

VII. "Person" shall mean any individual.

VIII. "Taxable year" shall mean the calendar or fiscal year, or portion thereof, upon the basis of which the New Hampshire tax is computed.

IX. "Taxable nonresident" shall mean any nonresident of the state whose adjusted gross income that taxable year includes any amount of New Hampshire derived income.

X. "New Hampshire derived income" shall mean, for any taxable year:

(a) rents, royalties and gain derived from the ownership of property within the state;

(b) wages, salaries, fees, commissions or other income received with respect to personal services performed of whatever kind and in whatever form paid derived from activities (1) performed within this state, or (2) performed from a base of operations within this state and not subject to an income tax within the state where the services are performed.

(c) income derived from every business, trade, occupation or profession of the taxpayer to the extent that the business, trade, occupation or profession is carried on within the state. But New Hampshire derived income shall not include any income excluded from adjusted gross income as defined in this section nor any taxable business profits taxed pursuant to the business profits tax.

XI. "Resident" shall mean:

(a) an individual domiciled in the state except one who maintains a permanent place of abode outside the state, does not maintain one within the state and does not spend more than thirty days of the taxable year within the state; or

(b) an individual who maintains a permanent place of abode within the state and spends more than one hundred eighty-three days of the taxable year within the state.

XII. For the purposes of this act, interest, dividends and capital gains received by the taxpayer from the ownership or sale of stock or from a beneficial interest in a trust and all income received by the taxpayer from a retirement system of any kind or from an annuity or other insurance plan shall be deemed to have been earned in the state of residence of said taxpayer.

77-B:2 Tax Imposed.

I. On Residents, Income Earned Outside New Hampshire. A tax is hereby imposed upon every resident of the state, which shall be levied, collected and paid annually at the rate of four percent of their income which is derived outside the state of New Hampshire as defined in RSA 77-B:1 "New Hampshire taxable income;" provided, however, that if such income shall be subject to a tax in the state in which it is derived, such tax shall constitute full satisfaction of the tax hereby imposed; and provided further, that if such income is exempt from taxation because of statutory or constitutional provisions in the state in which it is derived, or because the state in which it is derived does not impose an income tax on such income, it shall be exempt from taxation under this paragraph.

II. On Nonresidents, Income Earned in New Hampshire. A tax is hereby imposed upon every taxable nonresident, which shall be levied, collected and paid annually at the rate of four percent of their New Hampshire derived income as defined in RSA 77-B:1 less an exemption of two thousand dollars; provided, however, that if the tax hereby imposed exceeds the tax which would be imposed upon such income by the state of residence of the taxpayer, if such income were earned in such state, the tax hereby imposed shall be reduced to equal the tax which would be imposed by such other state.

III. Exception. Notwithstanding the provisions of paragraphs I and II, no tax shall be imposed upon salaries paid to men or women in the armed forces of the United States.

77-B:3 When Taxed. The tax imposed by RSA 77-B:2 shall be levied, collected, and paid by the fifteenth of the fourth month following the close of the taxable year.

77-B:4 Administration.

I. This chapter shall be administered and enforced by the business profits tax division of the tax commission subject to the supervision of the tax commission. The commission as authorized by governor and council, subject to personnel statutes, shall appoint such additional technical, cleri-

cal, and other personnel as the commission shall deem necessary to carry out the provisions of this chapter. The director of the business profits tax division shall have such powers, duties and functions in the enforcement of this chapter as the commission may from time to time assign. The director shall furnish a bond in an amount set under RSA 93.

II. Subject to the approval of the commission, the director may prescribe rules and regulations reasonably designed to carry into effect the intent and purpose of this chapter. These rules and regulations are prima facie evidence of its proper interpretations.

III. Subject to approval of the commission, the director is authorized to equip the division with furniture, equipment and supplies necessary to administer the division.

IV. The expenditures authorized by paragraphs I and III of this section shall be a charge against the moneys collected pursuant to this chapter, provided, however, that until such time as moneys received pursuant to this chapter equal the cost of administering the same, the expenditures shall be a charge against the general fund. The governor is authorized to draw his warrants from the sums so authorized out of any money in the treasury not otherwise appropriated.

77-B:5 Credit for Taxes Withheld. Income upon which any tax is required to be withheld at its source under RSA 77-B:10-16 shall be included in the return of the recipient of such income, but any amount of tax so withheld shall be credited against the amount of income tax as computed in such return.

77-B:6 Reciprocal Provisions. The commission is authorized to enter with any other state or country a reciprocal agreement in which such other state or country agrees not to impose a personal income tax upon income received by residents of this state and this state agrees not to impose a personal income tax upon income received by residents of such other state or country; provided, however, that such reciprocal agreement shall not become effective until the beginning of the next fiscal biennium after the date of such agreement.

Returns

77-B:7 Returns and Refunds of Individuals.

I. A taxpayer shall file a return of his net income for such a period and on such accounting basis as is authorized under the internal revenue code. For each taxable year, returns shall be made to the commission in such form and manner and to such extent as it shall prescribe by regulations, by the following taxpayers:

(a) A resident having for such taxable year any New Hampshire taxable income as defined in RSA 77-B:1; provided, however, that if it shall appear to the satisfaction of the commission that any residents of this state, or class of residents of this state, who are subject to the tax imposed by this act, are liable for tax upon the same income under the law imposed for the taxable year by another state and are thereby entitled to a credit allowed by section 2 of this chapter against the tax otherwise due under

this chapter, the commission shall by regulation relieve such residents or class of residents from being required to make any return under this chapter.

(b) A nonresident having for such taxable year New Hampshire derived income of two thousand dollars or more.

II. A husband and wife may make a single joint return to the commission for a taxable year for which such a return is filed under the laws of the United States. If the taxpayer if unable to make his own return, the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer.

III. Whenever a taxpayer shall file a return which shows that his withholding tax or estimated tax exceeds the amount of tax liability due under this chapter, he shall be due a refund and the tax commission shall forthwith certify the amount of said refund to the state treasurer who shall pay the same to the taxpayer; provided, however, that at the option of the taxpayer, said refund may be credited against any tax due from said taxpayer for the succeeding calendar year.

IV. Any refund or credit due a taxpayer pursuant to paragraph III for which said refund or credit is not requested within five years shall be deemed the property of the state of New Hampshire.

77-B:8 Information Returns. Each individual, partnership, corporation, joint stock company or association or insurance company, being a resident or having a place of business in this state, in whatever capacity acting, including lessees or mortgagors of personal property, fiduciaries, employers and all officers and employees of the state or of any political subdivision of the state, having the control, receipt, custody, disposal or payment of salaries, wages, rentals, or other compensation or income subject to the provisions of this chapter paid or payable during any year to any individual subject to a tax under this chapter shall on such date or dates as the commission shall from time to time designate, make complete return thereof to the commission.

77-B:9 Form and Verification of Returns. Returns shall be in such form as the commission may from time to time prescribe and shall be filed at any office which may be established on or before the fifteenth day of the fourth month following the close of the taxable year. In case of sickness, absence or other disability, or whenever good cause exists, the commission may allow further time for filing returns. Returns shall be verified by written declarations that the statements therein are made subject to the pains and penalties of perjury. When a return is made for a corporation or partnership, the person signing such return shall be deemed to be the person subject to the pains and penalties of perjury. The commission shall cause to be prepared blank forms for the returns and shall cause them to be distributed throughout the state and to be furnished upon application, but failure to receive or secure the form shall not relieve a taxpayer from the obligation of making the return herein required.

Withholding of Tax

77-B:10 Who Must Withhold. Every employer, as defined under the laws of the United States in effect April 26, 1947, with respect to income

tax collected at its source, employing any person liable for a tax pursuant to the provisions of this chapter shall deduct and withhold upon wages paid to said employee, a tax equal to four percent of such wages subject to the provisions of RSA 77-B:13.

77-B:11 Return of Withheld Taxes. Every employer required to deduct and withhold any tax under RSA 77-B:10 shall make return thereof to the commission on or before February fifteenth in each year and shall pay quarterly the tax withheld to the commission, provided, however, that the commission may, if such action is necessary in any emergency where collection of the tax may be in jeopardy, require such employer to make such return and pay such tax at any time, or from time to time.

77-B:12 Employer's Liability. Every employer required to deduct and withhold a tax under RSA 77-B:10 is hereby made liable for such tax and is hereby indemnified against the claims and demands of any individual, corporation or partnership for the amount of any payments made in accordance with the provisions of this chapter.

77-B:13 Use of Withholding Tables. At the election of the employer with respect to such employee, the employer may deduct and withhold upon the wages paid to such employee a tax determined on the basis of tables to be prepared and furnished by the commission, which tax shall be substantially equivalent to the tax provided in RSA 77-B:10 and which shall be in lieu of the tax required in such section.

77-B:14 Amount of Withheld Taxes as Lien Against Employer. If any employer required to deduct and withhold a tax under RSA 77-B:10 neglects or refuses to pay the same after demand, the amount, including interest after such demand, together with any costs that may accrue in addition thereto, shall be a lien in favor of the state of New Hampshire upon all property and rights to property, whether real or personal, belonging to such employer. Such lien shall arise at the time the assessment and demand is made by the commission and shall continue until the liability for such sum, with interest and costs, is satisfied or becomes unenforceable. Such lien shall be valid as against any subsequent mortgagee, pledgee, purchaser or judgment creditor when notice of such lien and the sum due has been filed by the commission with the clerk of the town or city in which the property subject to the lien is situated, or, in the case of an unorganized town or grant, in the office of the register of deeds for the county wherein such property is situated. In the case of any prior mortgage on real or personal property so written as to secure a present debt and also future advances by the mortgagee to the mortgagor, the lien herein provided, when notice thereof has been filed in the proper clerk's office, shall be subject to such prior mortgage unless the commission also notifies the mortgagee of the recording of such lien in writing, in which case any indebtedness thereafter created from mortgagor to mortgagee shall be junior to the lien herein provided for.

77-B:15 Release of Lien. The commission shall issue and record a certificate of release of the lien if:

I. The commission finds that the liability for the amount assessed and demanded, together with interest and costs, has been satisfied or has become unenforceable; or

II. There is furnished to the commission a bond with surety approved by the commission in a penal sum sufficient to equal the sum assessed and demanded, together with interest and costs, said bond to be conditioned upon the payment of any judgment rendered in proceedings regularly instituted by the commission to enforce collection thereof at law.

77-B:16 Foreclosure of Lien. The lien provided for by RSA 77-B:14 may be foreclosed in the case of real estate agreeably with the provisions of law relating to foreclosure of mortgages on real estate, and in the case of personal property, agreeably with the provisions of law relating to the foreclosure of chattel mortgages.

Estimated Tax Declarations

77-B:17 Who Must File.

I. Individuals liable for the tax assessed under this chapter shall annually on the fifteenth of the fourth month following the close of the taxable year furnish the tax commission with an estimate of income subject to taxation under this chapter for the current taxable year from which no New Hampshire withholding tax is expected to be made if such income can reasonably be expected to exceed ten thousand dollars.

II. The filing of estimates shall not be applicable to persons receiving their income from farming as defined under the United States code.

77-B:18 Payment of Estimated Tax. Each taxpayer required to file an estimated tax declaration shall include with his declaration of estimated income payment of not less than one-quarter of the tax due thereon. Thereafter, on the fifteenth days of the sixth and ninth months following the close of the taxable year the taxpayer shall pay not less than one-quarter of the tax due upon said estimated income or any revised estimate thereof.

77-B:19 Payment of Fourth Installment — General Rule. Annually on the fifteenth day following the close of the taxable year for which the estimate of income was made, the taxpayer, whose income can reasonably be expected to exceed his estimated income by thirty percent or more shall file an amended declaration of estimated income on or before such date and make payment in full of the balance of the tax due thereon, or in lieu thereof may file a return for the taxable year for which the estimate was made and pay the tax in full as computed on the return on or before the last day of the first month following the close of said taxable year. Otherwise, the final quarterly payment may be made with the taxpayer's return on the fifteenth day of the fourth month following the close of the taxable year for which the taxes were due.

77-B:20 — Exceptions. This requirement to amend or file a return shall not apply, however, if the taxpayer files a declaration of estimated income and makes payment of the tax due thereon as provided in this chapter, based upon:

I. The tax shown on the return by the taxpayer for the preceding taxable year, if a return showing a liability for tax was filed by the taxpayer for the preceding taxable year and such preceding year was a taxable year of twelve months, or

II. An amount equal to the tax computed at the rates applicable to the taxable year, on the basis of the taxpayer's status for the taxable year, but otherwise on the basis of the facts shown on his return for, and the law applicable to, the preceding taxable year.

77-B:21 Adjustments; Procedure. The commission is empowered to determine whether there has been error in the assessment of the tax imposed by this chapter, in accordance with the following provisions:

I. The taxpayer may demand such a determination, in writing, within three years after the tax was due or paid, whichever is later;

II. The commission may, on its own motion, undertake such a determination upon written notice to the taxpayer given within three years after the tax was due or paid, whichever is later.

III. After hearing, if requested by the taxpayer, the commission shall affirm or shall increase or decrease the tax theretofore assessed. Any increase ordered by the commission shall be assessed against the taxpayer and shall carry ten percent interest from the date originally due. Any decrease ordered by the commission shall, with ten percent interest from the date the tax was paid, be credited against any unpaid tax then due from the taxpayer and any balance due the taxpayer shall be certified to the state treasurer who shall pay the balance to the taxpayer, but such credit and payment together may not exceed the amount of the tax originally paid, plus interest.

77-B:22 Appeal. Within thirty days after notice of any adjustment of a tax by the commission under RSA 77-B:21, a taxpayer may appeal the commission's determination by petition to the superior court in the county where the taxpayer resides or, if not a resident, in the county where he has a place of business or a resident agent. The superior court shall determine the correctness of the commission's action de novo.

Miscellaneous Provisions

77-B:23 Penalty. Whoever violates any of the provisions of this chapter shall be fined not less than one hundred dollars nor more than two thousand dollars, or imprisoned not more than one year or both.

77-B:24 Disposal of Revenue. The revenue received from this tax, after paying the expense of administrating this chapter shall be paid into the general fund.

77-B:25 Investigation, etc.

I. The commission may take the oath of any person in the course of any hearing authorized by this chapter. In connection with hearings, the commission and taxpayer have the power to compel attendance of witnesses and the production of books, records, papers, vouchers, accounts or

other documents. The commission and taxpayer may take the depositions of witnesses residing within or without the state pertaining to a matter under this chapter, in the same way as depositions of witnesses are taken in civil actions in the superior court. Fees of witnesses are the same as those allowed to witnesses in the superior court and in the case of witnesses summoned by the commission shall be considered as an expense of administration of this chapter.

II. Any notice required by this chapter to be given by the commission to a taxpayer shall be made by certified mail to the last known address of the taxpayer and in the case of hearings shall be given at least ten days before the date thereof.

77-B:26 Confidentiality of Commission Records. Notwithstanding any other provision of law and except as hereinafter provided, the records and files of the commission respecting the administration of this chapter are confidential and privileged. The commission, and any employee engaged in the administration of this chapter or charged with the custody of any such records or files, shall not disclose any information obtained from the commission's records or files or from any examination, investigation or hearing authorized by this chapter. Neither the commission nor any employee of the commission may be required to produce any of the records, files and information for the inspection of any person or for use in any action or proceedings. The following exceptions apply to this section:

I. Testimony by a member or employee of the commission and production of records, files and information in behalf of the commission or a taxpayer in any action or proceeding under the provisions of this chapter where such testimony or the records or files or information, or the facts shown thereby are directly involved in the action or proceeding;

II. Delivery to a taxpayer or his duly authorized representative of a copy of any return or other paper filed by the taxpayer pursuant to this chapter;

III. Publication of statistics so classified as to prevent the identification of a particular return and the items of the return;

IV. Exchange of information with the United States internal revenue service in accordance with compacts made and provided for such cases;

V. Disclosure in confidence to the governor and council or their agent in the exercise of their general supervisory powers, or to any person authorized to audit the accounts of the commission in pursuance of such audit, or to the attorney general or other legal representative of the state in connection with an action or proceeding under this chapter.

77-B:27 Preference. The taxes and interest imposed by this chapter have preference in any distribution of the assets of the taxpayer, whether in insolvency or otherwise.

77-B:28 Dissolution of Corporations. No corporation organized under any law of this state may be dissolved until all taxes and interest required to be withheld by said corporation under this chapter have been fully paid.

The secretary of state shall not issue a certificate of dissolution, and no decree of dissolution shall be signed in any court without a certificate from the commission that no taxes and interest imposed by this chapter are due and unpaid.

[RSA 77-B:2 effective July 1, 1970, and remainder of Chapter 77-B effective May 4, 1970]

APPENDIX E

MAINE REVISED STATUTES ANNOTATED TITLE 36, PART 8

§ 5111. Imposition and rate of tax

A tax is hereby imposed for each taxable year on the entire taxable income of every resident individual of this State and on the taxable income of every nonresident individual which is derived from sources within this State. The amount of the tax shall be determined in accordance with the following table:

If the taxable income is:	The tax is:
Not over $2,000	1% of the taxable income
$2,000 but not over $5,000	$20 plus 2% of excess over $2,000
$5,000 but not over $10,000	$80 plus 3% of excess over $5,000
$10,000 but not over $25,000	$230 plus 4% of excess over $10,000
$25,000 but not over $50,000	$830 plus 5% of excess over $25,000
$50,000 or more	$2,080 plus 6% of excess over $50,000

§ 5127. Credit for income tax paid to another state

1. Resident individual. A resident

individual shall be allowed a credit against the tax otherwise due under this part for the amount of any income tax imposed on him for the taxable year by another state of the United States or a political subdivision thereof or the District of Columbia on income derived from sources therein and which is also subject to tax under this part.

2. Limitation on credit. The credit provided under this section shall not exceed the proportion of the tax otherwise due under this part that the amount of the taxpayer's adjusted gross income derived from sources in the other taxing jurisdiction bears to his entire adjusted gross income as modified by this part.